

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD
ORDER WQ 2006 – 0007

In the Matter of the Petitions of

BOEING COMPANY

For Review of Waste Discharge Requirements (WDR) Orders
R4-2004-0111, R4-2006-0008, and R4-2006-0036 for the
Santa Susana Field Laboratory
Issued by the
California Regional Water Quality Control Board,
Los Angeles Region

**SWRCB/OCC FILES A-1653 AND A-1737
ORDER ON STAY REQUEST**

BY THE BOARD:

The Los Angeles Regional Water Quality Control Board (Los Angeles Water Board) issued waste discharge requirements to Boeing Company (Boeing) in July 2004, in Order No. R4-2004-0111 [NPDES No. CA0001309] (Permit). In January and March 2006, the Los Angeles Water Board amended the Permit, each time adding and revising various effluent limitations. (Order Nos. R4-2006-0008 and R4-2006-0036, respectively.) The Permit regulates discharges of wastewater and storm water from Boeing's Santa Susana Field Laboratory (SSFL). Boeing filed a timely petition for review of the Permit in August 2004, but asked the State Water Resources Control Board (State Water Board) to hold the petition in abeyance. (File No. A-1653.) Following the January 2006 amendments, Boeing filed another petition. (File No. A-1737.) In its second petition, Boeing challenged the January 2006 amendments, activated File No. A-1653, and requested a stay of certain numeric effluent limitations in both the original Permit and the amendments. Following the March 2006 amendments, Boeing filed a third petition, which challenged these latest amendments and also asked that the numeric effluent limitations in this amendment be stayed.¹

¹ The third petition is considered to be an amendment to the 2006 petition, File No. A-1737. File Nos. A-1653 and A-1737 have been consolidated for purposes of review. (Cal. Code Regs., tit. 23, § 2054.) Committee to Bridge the Gap (CBG), which is a party in this matter, also filed a petition challenging the Permit after its adoption in 2004. (File A-1653(a).) The State Water Board denied CBG's
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The State Water Board held a hearing to consider Boeing's request for a stay of numeric effluent limitations on April 3, 2006.² At the close of the hearing, Boeing was asked to provide more details on the specific effluent limitations it requested stayed. Boeing submitted a letter, dated April 4, which included a table of constituents listed by outfall. On April 7, the State Water Board, by its Hearing Officer, issued a stay of many of the numeric effluent limitations in the Permit—the same effluent limitations listed in Boeing's April 4 table. (Order WQ 2006-0002.) On May 3, 2006, Board Chair Doduc notified Boeing and interested persons that the State Water Board would meet *en banc* to review Order WQ 2006-0002. Chair Doduc asked for comments on Order WQ 2006-0002 and for comments on Boeing's April 4 letter and letters from the Los Angeles Water Board and Boeing concerning the propriety and substance of the April 4 letter and table. This Order has been considered by the entire State Water Board and replaces Order WQ 2006-0002. For the reasons described herein, this Order vacates Order WQ 2006-0002 and dissolves the stay.

I. BACKGROUND

Boeing's SSFL consists of approximately 2800 acres in the Simi Hills in Ventura County. SSFL has been used for numerous industrial activities for over 50 years, including research, development, assembly, disassembly and testing of rocket engines, missile components, and chemical lasers. It is the subject of cleanup activities conducted under the authority of the Department of Toxic Substances Control (DTSC). Boeing and the National Aeronautics and Space Administration own SSFL; the United States Department of Energy also owns several buildings on the site. Site remediation activities are ongoing and current activities include domestic waste treatment, groundwater treatment, and rocket engine testing.³ In

request for a stay of the Permit (Order WQO 2004-0014) and dismissed its petition (Letter from Celeste Cantú, dated February 14, 2005).

² Board Member Secundy sat as Hearing Officer.

³ At the Stay hearing, Boeing representatives testified that the company was ending all rocket engine testing and would resume testing only after it was able to remove all wastewater from the testing off-site, without any resulting discharges to waters. Boeing representatives also testified that the sewage treatment plant was no longer operating. These statements about discharges being stopped are relevant only insofar as Boeing no longer requests a stay of the effluent limitations for rocket engine testing stands. Insofar as regulation of discharges are concerned, as discussed *infra*, the rules for discharges of commingled wastewater and storm water vary from those for storm water only, and the permit currently regulates discharges of process water discharges from rocket engine testing and a sewage treatment plant. If Boeing intends to stop some process water discharges, and to have its permit reflect that
(Continued)

addition to the process water discharges from the sewage treatment plants and from rocket engine testing, there is storm water runoff from the site into Bell Creek, which is tributary to the Los Angeles River and into various drainages toward Arroyo Simi, Runkel, Dayton, and Woolsey Canyon.

The Permit describes 18 outfalls from which discharges are regulated. Outfalls 001 and 002 have discharges of commingled wastewater and storm water runoff. Outfalls 011 and 018 also have discharges of wastewater and storm water runoff—prior to the 2006 permit amendment they were used as monitoring stations rather than compliance points. Outfall 011 has discharges of commingled storm water and wastewater from a pond containing effluent from a sewage treatment plant, treated groundwater, and runoff, and Outfall 001 is downstream of Outfall 011. Outfall 018 has discharges from a pond containing effluent from treated groundwater, engine test stand areas, and storm water runoff, and Outfall 002 is downstream of Outfall 018. Outfalls 003 through 010 have discharges of storm water runoff only. Outfalls 008 through 010 were previously used as monitoring stations, but since 2004 have assigned effluent limitations. Outfalls 012 through 014 have discharges of process water from rocket engine testing. Outfalls 015 through 017 have discharges of process water from the sewage treatment plant. Boeing's stay request originally included certain effluent limitations for all outfalls except 015 through 017. At the hearing on the stay request, Boeing abandoned its request as to Outfalls 012 through 014.⁴ Order WQ 2006-0002 stayed effluent limitations for Outfalls 001 through 011 and 018.

While this Order will not decide issues that will later be addressed in a final order on the merits, we will make brief comment on statements Boeing makes concerning the propriety of numeric effluent limitations in storm water permits. First, while Boeing concedes that only eight of its eighteen outfalls have discharges of "storm water only,"⁵ and that outfalls 001, 002, 011, and 018 discharge predominantly storm water, which is commingled with process water, Boeing appears to claim that the same regulatory assumptions for storm water apply to all twelve of these outfalls. In fact "storm water" discharges are regulated separately

change, it must submit a Report of Waste Discharge reflecting that change before the Permit can be revised. (Wat. Code, § 13260(c).)

⁴ The description of the stay request and the specific effluent limitations stayed by Order WQ 2006-0002 is discussed further, *infra*.

⁵ These are outfalls 003 through 010.

from process wastewater discharges, but only to the extent that storm water runoff is segregated and separately discharged from process water. The storm water permitting requirements established in the federal Clean Water Act are limited to “discharges composed entirely of storm water.” (33 U.S.C. § 1342(p)(1); Clean Water Act § 402(p)(1).) The federal regulations establishing the requirements for storm water regulations define “storm water” as “storm water runoff, snow melt runoff, and surface runoff and drainage.” (40 C.F.R. § 122.26(b)(13).) Thus, the regulatory references and requirements for “storm water regulation” do not apply to Outfalls 001, 002, 011, or 018.⁶

In order to issue a stay of effluent limitations in the Permit, the State Water Board must find that Boeing has alleged facts and produced proof of: (1) substantial harm to Boeing or to the public interest if a stay is not granted; (2) a lack of substantial harm to other interested persons and to the public interest if a stay is granted; and (3) substantial questions of law or fact regarding the disputed action. (Cal. Code Regs., tit. 23, § 2053.) It is incumbent on Boeing to meet all three prongs of the test before a stay may be granted. (Order WQO 2002-0007 (*County of Los Angeles, et al.*)) In addition, the issue of whether a stay is appropriate must be judged in the temporal sense—Boeing must prove that it will suffer substantial harm if a stay is not granted for the period of time pending resolution of the petition on the merits. (*Id.*) The issue before the State Water Board is *not* whether Boeing might prevail on any of the merits of its claims, or whether Boeing will suffer harm over the term of the Permit.

CONTENTIONS AND FINDINGS

1. Contention: Boeing contends that it will suffer substantial harm if a stay of effluent limitations in the Permit is not granted.

Finding: When Boeing requested a stay, in February 2006, it provided three reasons for the stay request.⁷ Boeing explained that the January 2006 Permit amendments

⁶ It may be the case that the process water discharges through these four outfalls are infrequent and minimal compared to the storm water runoff. Nonetheless, by commingling any process water with storm water runoff, the rules for regulating storm water under Clean Water Act § 402(p) do not apply. Boeing may, of course, revise its operations to segregate all process water. The fact that commingled discharges are not treated as storm water from a regulatory standpoint does not, of course, mean that there are no exceptions for the inclusion of numeric effluent limitations. (See, e.g. Order WQO 2001-006 (*Avon Refinery*); upheld in *Communities for a Better Environment v State Water Board* (2003) 109 Cal.App.4th 1089, hearing denied (numeric effluent limitations for one constituent—dioxin—not required for discharge of commingled storm water and process water).)

⁷ The Boeing Company’s Request for Stay (February 16, 2006).

included new numeric effluent limitations, including for some storm water discharges, which required “immediate compliance” and that the Los Angeles Water Board refused to adopt a cease and desist order with a compliance schedule. First, Boeing argued that the Los Angeles Water Board improperly established stringent numeric effluent limitations for “storm water discharges” based on the California Toxics Rule (40 C.F.R. Part 131.38; CTR), that the CTR does not apply to storm water discharges, that it is neither possible to immediately eliminate all storm water discharges nor technologically feasible to collect and treat all runoff, and that exceedances of permit limitations are “inevitable and unavoidable.” Second, Boeing pointed to the Topanga Fire that burned through approximately 70 percent of the SSFL site in September 2005, devastating vegetation used as best management practices (BMPs) to control pollutants in storm water runoff, and resulting in preliminary post-fire data demonstrating increased concentrations of regulated constituents in runoff. Third, Boeing presented arguments about its “hot fire” rocket engine testing, claiming harm to national interests. Boeing abandoned the third argument at the stay hearing and is no longer seeking a stay of the effluent limitations associated with rocket engine testing.

For the reasons specified below, Boeing has failed to prove substantial harm justifying a stay of effluent limitations. Boeing seeks to stay effluent limitations that have been in place since as early as July 2004, even though it did not file its stay request until February 2006. The evidence of its inability to comply with specific effluent limitations is vague and insubstantial. It was not until after the stay hearing ended, and only after request by State Water Board staff, that Boeing listed the specific effluent limitations it sought stayed. That list included some limitations that were not more stringent than in Boeing’s 1998 permit, and limitations for which there was not clear evidence that Boeing could not comply. Finally, the main harm that Boeing claims—threats of enforcement—is not justification to stay the underlying permit provisions.

The Specific Effluent Limitations That Boeing Seeks to Stay

Boeing’s allegations and testimony regarding harm it will suffer derive from its claimed inability to ensure compliance with numeric effluent limitations that were immediately effective upon adoption, and for which it may take up to four years to come into compliance. Its arguments concerning difficulty of compliance are based on the strict limitations in the Permit⁸ and the effects of the Topanga fire.

⁸ The propriety of numeric effluent limitations for storm water discharges, and for discharges of commingled wastewater and storm water, will be addressed when we consider the merits of the petitions.

We will first review the specific effluent limitations for which Boeing seeks a stay before discussing Boeing's claim that it cannot meet these limitations. This is particularly important because some of the limitations were adopted in July 2004—almost two years before Boeing requested a stay. As we stated above, a stay is temporal in nature and it is critical to analyze the time between the Regional Water Board's actions and when the State Water Board will review the petition on its merits. As summarized above, Boeing seeks a stay of numeric effluent limitations that were added or revised in the Permit adopted in July 2004, amended in January 2006, and amended again in March 2006. When it first filed a petition for review in August 2004, Boeing did not seek a stay and asked the State Water Board to hold the petition in abeyance, meaning that this Board would not actively review the petition. After the Topanga Fire, which Boeing states destroyed much of its BMPs, Boeing still did not activate the original petition or request any relief from the State Water Board, even though the fire occurred just before the rainy season was to begin. After the Los Angeles Water Board amended the 2004 Permit and refused to issue an order with a compliance schedule, in January 2006, Boeing requested the stay. The request was augmented after the Los Angeles Water Board amended the Permit again in March 2006, adding more effluent limitations. Boeing requests a stay of "new numeric effluent limits added to the 2004 or 2006 Permits, applicable to all storm water discharges" and "new effluent limits added to the 2006 Permit, applicable to waste water discharges at Outfalls 012 and 018."

This request is somewhat ambiguous, especially due to Boeing's characterization at times of commingled wastewater as "storm water."⁹ Because of the lack of specificity in the request for a stay, the Attorney assisting the Hearing Officer at the stay hearing asked Boeing to submit a list of the constituents and discharge points for which it seeks a stay. On April 4, 2006, the day after the hearing, Boeing submitted a letter that clarified its request and included a table showing all constituents with "potential" to exceed either the 2004 or the 2006 permit limitations. Boeing explained its specific request as including all limitations that are either more stringent or are subject to a different analytical methodology than in the 1998 permit. Boeing based its "potential" determination on monitoring or samples indicating that during storm events limitations were exceeded, and when either no or limited monitoring data were available. Attachment A to Order WQ 2006-0002 lists these same effluent limitations as those subject to the stay.

⁹ In any event, Boeing did abandon its request for a stay of effluent limitations for Outfall 012.

The State Water Board finds the procedure that allowed this late submission into the record—and which was at least partly the basis for the stay order—was inappropriate because the other parties were not given an opportunity to respond. The hearing notice clearly required all submissions and evidence prior to the hearing. On April 6, the Los Angeles Water Board did respond to the submission, and, after deciding to take up this matter *en banc*, this Board specifically requested comment on the letters received after the close of the hearing.¹⁰ The specific harm that may have been caused by this procedural irregularity has therefore been allayed. Boeing also argues that its request has been clear throughout: it seeks a stay of all effluent limitations for Outfalls 001 through 011 and 018¹¹ that were made more stringent or subject to different analytical methods after the 1998 permit. We shall treat that as the request for purposes of this Order.

Effluent Limitations in 2004 Permit

In February 2006, Boeing requested a stay of effluent limitations that had been in place since July 2004. The request is for a stay of all effluent limitations, for storm water and for commingled discharges, which are changed from the prior permit adopted in 1998. While we have not before addressed a request for a stay that was not made until two years into the term of a permit, Order WQ 2002-0007 (*County of Los Angeles, et al.*) makes clear that such a delay is not appropriate. We stated there: “It is important to note that all three prongs of the test must be met before a stay is required. In addition, all three prongs concern whether a stay should be granted, and not whether the petitions should be upheld on the merits. Thus, for example, it is not relevant to attempt to prove that dischargers will suffer substantial harm, over the term of the permit, if the permit is upheld. The issue in a stay determination is whether they will suffer substantial harm if a stay is not granted for the period of time pending resolution of the petitions on their merits.”¹² Following adoption of the 2004 permit, Boeing filed a petition but requested that it be held in abeyance. According to the testimony of its representatives, Boeing decided not to pursue its appeal and instead to try to obtain compliance. It was not until after the Topanga Fire in September 2005 and the permit revision in January 2006 that Boeing sought a stay.

¹⁰ Letter from Chair Doduc to Peter Nyquist, dated May 3, 2006.

¹¹ As noted above, the original request regarding Outfalls 012 through 014 was dropped during the hearing.

¹² Order WQ 2002-0007 at p. 3.

Issuing a stay long after a permit is adopted is inconsistent with our prior stay orders and with the Water Code provisions regarding issuance of stays. We have explained that issuance of a stay is an “extraordinary” remedy that requires a strong showing of harm: “The State Water Board’s administrative regulations, recognizing the extraordinary nature of a stay remedy, place a heavy burden on the seeker of a stay.”¹³ The essence of Boeing’s arguments regarding the 2004 provisions is that it took time to determine non-compliance and the Topanga Fire made compliance much more difficult. While it is admirable that Boeing chose to attempt to achieve compliance, rather than simply pursuing its appeal in 2004, we cannot overlook the fact that a delay in seeking a stay of almost two years removes the immediacy of the extraordinary stay remedy. A stay is meant to provide a brief period of relief from a Regional Water Board’s order pending resolution on the merits. For a stay to be requested several years after the Regional Water Board’s action is inconsistent with the purpose of the stay.¹⁴ Further reference to the speedy nature of a decision on a stay request is found in the Water Code, where the State Water Board is required to act on stay requests “within 60 days of accepting the petition.”¹⁵ We conclude that Boeing’s stay request for relief of effluent limitations added or revised when the 2004 Permit was adopted is not timely.¹⁶ We also note that, even for numeric effluent limitations revised in January or March 2006, many of these constituents were previously regulated in the 1998 and 2004 permits. If a stay were justified, the stay order would have to specify the effluent limitations that would remain in effect. There is no basis, in any event, to stay all effluent limitations for outfalls that have been regulated or revised since 1998.

It is conceivable that there will be instances where a stay request is made after a change in circumstances. Whether the Topanga Fire could constitute such changed circumstances is an interesting question, but since Boeing waited five months, through a rainy season, to ask for the stay, we need not answer that hypothetical question here.

¹³ Order WQ 97-05 (*Ventura County Citizens*) at p. 4.

¹⁴ Several parties have commented that Order WQ 2006-0002 is not clear regarding whether the stay applies retroactively to 2004. There is nothing in the Order that says it was retroactive.

¹⁵ Wat. Code, § 13320(e).

¹⁶ This conclusion is limited to the request for a stay. Boeing claims that the Los Angeles Water Board should have provided relief to Boeing, especially after the Topanga Fire, by issuing a compliance schedule. That is an issue we will consider on the merits of the petitions.

Evidence of Violation of Effluent Limitations

Boeing has included in its lists of numeric effluent limitations for which it seeks a stay, limitations that it has not exceeded, but which it may exceed in the future, and limitations for which there is no monitoring data. The list includes all effluent limitations Boeing violated at least once since July 2004, even though there may not be an ongoing threat of violation. It also includes effluent limitations that have never been violated, or for which there is no monitoring data, but where the constituent is “expected elevated due to Topanga Fire.” Boeing failed to detail those effluent limitations for which it sought stay relief throughout its papers and the hearing until after the hearing was closed, and even then it did not provide specific evidence that these limitations *will* be violated—or, at least, that violations will occur if there is rainfall and runoff. Boeing also failed to specify the appropriate replacement limitation where an effluent limitation had been in place in the 1998 permit. The result was that Order WQ 2006-0002 stayed many effluent limitations for which at least some other effluent limitation had been in effect since 1998. Boeing has not met its burden of showing the need for the extraordinary relief afforded by a stay because it failed to specify and provide adequate evidence concerning the specific effluent limitations it seeks stayed. The issue in a stay request is not the likelihood of some violations of permit requirements over the term of the permit, but the expected conditions during the time that a stay would remain in place.¹⁷

Harm From Enforcement Actions and Citizens Suit

The specific harm Boeing states it will suffer is being immediately subject to civil and administrative enforcement, which could include administrative civil liability assessed by the Los Angeles Water Board and the citizen suit provisions of the Clean Water Act. Boeing representatives also testified about potential debarment from federal contracts and the impact on its business when violations of permits are reported in the local news.

The crux of Boeing’s argument of substantial harm is that it will immediately be subject to civil and administrative enforcement. As proof that this harm is not speculative, Boeing states that CBG has already filed a lawsuit under the citizen suit provisions of the Clean Water Act.¹⁸ In addition, the Los Angeles Water Board has issued Notices of Violation. Finally,

¹⁷ We understand that the need to make a timely request for a stay may appear inconsistent with the proof required for what will happen if a stay is not issued. But in this case, where there are monitoring data available for several years that can be the basis for determining the likelihood of violation, the list of “potential” violations is too broad.

¹⁸ Clean Water Act § 505.

Boeing stated that the Los Angeles Grand Jury is investigating permit violations by Boeing. We are concerned with the notion of the possibility of citizen suits and enforcement actions as a basis for a stay. It is Congress' decision that citizens can enforce NPDES permits and it is not appropriate for the state to prevent the exercise of that right.¹⁹ The California Legislature has also deemed that enforcement of NPDES permits by Regional Water Boards is a high priority, even making penalties mandatory in some instances.²⁰ In this case, in any event, we find that the possibility, or even probability, of enforcement actions does not justify a stay because it is very unlikely that these actions would be concluded during the time a stay would remain in place. CBG testified that its citizen suit would not progress in court within the time a stay would be in place. Boeing did not dispute this point, although it stated that it would still incur defense costs. CBG also pointed out that any enforcement action by the Los Angeles Water Board would not likely culminate in that time and the Board's representatives pointed out that even if it did issue an administrative civil liability fine, that fine would automatically be stayed pending appeal.²¹ We find these arguments persuasive. The possibility of final enforcement actions or actions on the citizen suit during the period a stay would be in effect, is too speculative to warrant a stay. Should this occur, Boeing may renew its stay request, limited to the permit provisions that were added or revised in 2006.

Negative Publicity and Debarment from Federal Contracts

In addition to the possibility of enforcement actions, Boeing claims that it will suffer substantial harm due to adverse publicity and the possibility of debarment from federal contracts. Boeing did submit newspaper articles critical of the company, but its attorney also stated at the hearing that issuance of a stay would not improve public perception. Regarding potential debarment, Boeing did not provide specific evidence or testimony to support this claim.

2. Contention: Boeing contends that interested persons and the public will not suffer substantial harm if a stay is granted.

Finding: Boeing claims that it will continue to follow the iterative approach to implementing BMPs if a stay is granted, that its contribution of pollutants to the Los Angeles River is minimal, and that it must comply with an existing cleanup and abatement order. Because Boeing has failed to prove that it will suffer substantial harm in the absence of a stay, it

¹⁹ Section 505 does require that citizen groups notify the state prior to commencing suit and it provides that enforcement by the state may bar such suits.

²⁰ Wat. Code, § 13385.

²¹ Wat. Code, § 13323(d).

is not necessary to rule on whether Boeing has met its burden regarding the absence of harm if a stay is granted.

3. Contention: Boeing contends that there are substantial questions of law and fact.

Finding: Boeing states that there are substantial legal questions posed by the stay request. In fact, as Boeing essentially concedes, the issue Boeing points to is one of policy rather than of law. It is true that the State Water Board is currently reviewing whether numeric effluent limitations should be included in storm water permits.²² This review does not, at least at this time, include individual permits such as Boeing's, which are written for individual facilities and which include both process water and storm water outfalls. Nonetheless, in light of the State Water Board's strong interest in the issue of whether various storm water permits should include numeric effluent limitations, there is a significant policy issue raised regarding the effluent limitations for Outfalls 003 through 010. Our regulations, however, require that the significant issues be of "law or fact."²³ We have not previously addressed whether this requirement should be interpreted to include significant policy issues, and none of the parties have specifically addressed this question of interpretation. In light of our conclusion that Boeing has not proved substantial harm, there is no reason for us to decide here whether a policy issue is one of "law or fact."

III. SUMMARY AND CONCLUSIONS

The State Water Board concludes that Boeing has not met its burden of proving each of the three conditions necessary for granting a stay of effluent limitations in the Permit. In particular, Boeing has not proved that it will suffer substantial harm while the petition is under review if a stay is not granted. The request for a stay must therefore be denied.

IV. ORDER

IT IS HEREBY ORDERED that Order WQ 2006-0002 is vacated, and the request for a stay of the effect of certain effluent limitations in Waste Discharge Requirements Order Nos. R4-2004-0111, R4-2006-0008, and R4-2006-0036 are DENIED.

²² As mentioned above, only eight of Boeing's eighteen outfalls are "storm water" discharges within the meaning of Clean Water Act § 402(p).

²³ Cal. Code Regs., tit. 23, § 2053.

CERTIFICATION

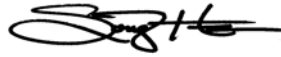
The undersigned, Clerk to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on June 21, 2006.

AYE: Tam M. Doduc
Arthur G. Baggett, Jr.
Charles R. Hoppin

NO: Gerald D. Secundy

ABSENT:

ABSTAIN:



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Clerk to the Board